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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1849

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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May 20, 1980

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IN THE

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No. _____

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Petitioners,

v.

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

The petitioners, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. (the "Circus") and Ruth F. Lutzky, a taxpayer and patron of the Circus suing on behalf of herself and all other Circus patrons and taxpayers similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered in this proceeding on November 20, 1979.

The court affirmed without opinion the orders and judgment of the New York State Supreme Court, County of New York, (1) denying petitioners discovery of relevant documents in respondents' possession concerning the enactment, appli-

cation and enforcement of the New York State Tax Law to tax admissions charges for the Circus while granting statutory and administrative tax exemptions to similar arena shows and entertainments of a "musical, dramatic or choreographic" nature; and, after denying discovery, (2) granting summary judgment, on the merits and on the basis of the pleadings alone, without granting any hearing or allowing discovery of any evidence on the constitutional issues raised by petitioners. These issues concern respondents' violation of petitioners' due process, equal protection, First Amendment and commerce clause rights under the Constitution of the United States by enacting, applying, and selectively enforcing the New York State admissions tax law against the Circus and its patrons while exempting from said taxes ice shows, dramatic plays, Broadway musicals, classical and rock concerts, motion pictures and even a competitor's wholly intrastate circus.

OPINIONS BELOW

No opinions were rendered by the Appellate Division of the Supreme Court, First Judicial Department, or by the Court of Appeals of the State of New York.

The opinion of the New York State Supreme Court, New York County (Postel, J.), dated March 23, 1976, denying discovery of respondents' files, is not reported. It is reprinted in the appendix hereto, p. 1a, *infra* (hereinafter cited as A. .)

The opinion of the New York State Supreme Court, New York County (Postel, J.), dated August 10, 1977, granting summary judgment to respondents, is not reported. It is reprinted in the appendix hereto. (A. 4a.)

The opinion of the New York State Supreme Court, New York County (Kirschenbaum, J.), dated April 18, 1978, on reargument, is not reported. It is reprinted in the appendix hereto. (A. 17a.)

JURISDICTION

The order and judgment of the Appellate Division of the New York State Supreme Court, First Department, which unanimously affirmed the order and judgment of the New York

State Supreme Court, New York County, dated May 23, 1978, was filed on November 20, 1979 (A. 27a). Petitioners duly appealed, and in the alternative sought leave to appeal, to the New York Court of Appeals. On February 20, 1980, that Court dismissed the appeal as of right upon the ground that "no substantial constitutional question is directly involved" and denied the motion for leave to appeal. This petition for certiorari is filed within ninety days of the order dismissing the appeal. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The relevant provisions of the United States Constitution are: Amendment Fourteen, Section 1, the Due Process and Equal Protection Clauses; Amendment One, the Freedom of Speech Clause; and Article I, Section 8, clause 3, the Commerce Clause.

STATE STATUTES

A. *New York State Tax Law,* Article 28, entitled "Sales and Compensating Use Taxes" (enacted by Laws of 1965, ch. 93, effective August 1, 1965):

1. New York State Tax Law §1105, entitled "Imposition of sales tax", subd. (f)(1):

> ". . . *there is hereby imposed* and there shall be paid *a tax of four percent upon:*
>
> . . .
>
> "(f)(1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the state, except charges for admission to* race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. . . ." (Emphasis added.)

2. New York State Tax Law §1101, entitled "Definitions", subd. (d)(5):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a live dramatic, choreographic* or *musical performance.*" (Emphasis added.)

3. New York State Tax Law §1116, entitled "Exempt organizations", subd. (d)(2)(B):

> "(2) The exemption provided in paragraph (1) of this subdivision [exempting admission charges to amusements for the benefit of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:
>
> . . .
>
> (B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation."

B. *Administrative Code of the City of New York,* Chap. 46, Title A, entitled "Sales and Related Taxes", (enacted by Local Law 1965, No. 73, July 22, 1965, effective August 1, 1965):[1]

1. Administrative Code §A46-2.0, entitled "Imposition of sales tax", subd. (f)(1):

> ". . . there is hereby imposed within the City of New York and there shall be paid a tax upon the receipts, rents, dues and charges specified in the following subdivisions (a), (b), (c), (d), (e), and (f) at the rate of four percent . . .
>
> "(f)(1) *Any admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement in the City of New York, except charges for* [admissions] *admission to* race tracks, boxing, sparring or

[1] Effective June 10, 1975, after this action was commenced, the City's sales tax (including the admissions tax) was suspended by Tax Law §1210(f) and replaced by a State tax imposed by Tax Law §1107 at the rate of four percent and identical, in relevant part, to the taxes imposed by Tax Law §1105. This State tax is to terminate upon payment of Municipal Assistance Corporation obligations, and the City tax is then to resume. (Tax Law §§1107(d) and 1210(i).)

wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances, or motion picture theatres,* and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools. . . ." (Emphasis added.)

2. Administrative Code §A46-1.0, entitled "Definitions", subd. (d)(5):

"(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for *a live dramatic, choreographic or musical performance.*" (Emphasis added.)

3. Administrative Code §A46-7.0, entitled "Exempt organization", subd. (d)(2)(B):

"(2) The exemption provided under paragraph (1) of this subdivision [exempting admission charges to amusements for the benefit of certain religious, charitable, educational and other organizations] shall not apply in the case of admissions to:

. . .

"(B) Carnivals, rodeos, or circuses in which any professional performer or operator participates for compensation . . ."

QUESTIONS PRESENTED

1. Whether State and City tax officials and the courts of the State of New York, by denying persons subject to the State and City sales taxes the right to discovery and a hearing on the issue of discriminatory purpose and intent and thus any access to the only evidence on that crucial element of their constitutional claims, and by then using the failure to produce such evidence to justify summary dismissal of those claims, violate the guarantee of procedural due process under the Fourteenth Amendment of the United States Constitution?

2. Whether arbitrary application and selective enforcement of the New York State Tax Law and the Administrative

Code of the City of New York to tax admissions to performances of the Circus while exempting other "live dramatic, choreographic or musical performances," absent a showing of any rational basis related to the purpose of such exemption, violate the Due Process and Equal Protection clauses of the United States Constitution?

3. Whether a State tax law's exclusion, without rational basis, of all circuses from an exemption for "dramatic or musical arts performances," on its face violates the constitutional rights of the Circus to free speech, due process and equal protection under the First and Fourteenth Amendments to the Constitution and the right of nondiscriminatory treatment as between interstate and intrastate enterprises under the Commerce Clause, Article 1, Section 8, clause 3, of the United States Constitution?

STATEMENT OF THE CASE

1. The Complaint

Petitioners' complaint sought a declaratory judgment "that if the Tax Law requires the Ringling Bros. Circus to collect state and city sales tax on admission charges from its patrons, while exempting therefrom admission charges for other live dramatic, choreographic and musical performances, the Tax Law on its face deprives [petitioners] of the equal protection of the laws in violation of . . . Amendment XIV, Section 1 to the Constitution of the United States, and that "the defendant State Tax Commission's arbitrary and discriminatory application of the Tax Law deprives [petitioners] of the equal protection of the laws in violation of . . . Amendment XIV, Section 1, to the Constitution of the United States." (Complaint ¶¶ 18(c), 18(d)).[2]

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[2] Since the fall of 1972 the Circus has not paid any admissions tax to respondents but, pursuant to Tax Law §1137(d), and with the consent of respondents, has posted a surety company bond. The bond, issued by the St. Paul Fire and Marine Insurance Company, is in the amount of One Million Six Hundred Sixty-One Thousand Three Hundred Twenty-Three ($1,661,323) Dollars plus accrued interest, and secures payment of any taxes which may be ultimately determined to be due.

2. The Undisputed Facts Regarding the Circus

(a) *The Circus's general form and content*

Ringling Bros.-Barnum & Bailey Circus, "The Greatest Show on Earth", has been an American institution for one hundred and ten years. The Circus's productions use hundreds of performers and animals and are a meld of dramatic, choreographic and musical elements. The individual acts and the gala production numbers are elaborately staged, choreographed, lighted and costumed. Continuously throughout the Show there is a live music program of over 200 compositions including songs sung by the ringmaster. The music is arranged for each production by a professionally employed musical director and performed by the fourteen-piece Circus band. (A. 44a.)[3]

The Circus has co-producers, a director, and a large production staff including the associate director, costume designer, assistant costume designer, aerial director, scenic consultant and lighting supervisor. Each year the Circus's choreographer, together with its co-producers, director, musical arranger and costume designers, create five elaborate production numbers for the upcoming year's new production. (A. 47a.) They include choreographed dance routines using props and stages,[4] employing trained dancers (many with previous experience in Broadway shows), specially arranged musical scores and spectacular processions in which virtually the entire huge Circus cast of over 150 artists participates. (A. 48a.)

The Circus performers are collectively known as "Artists" under the terms of the Circus's labor agreements and are represented in collective bargaining by the American Guild of Variety Artists (AGVA), AFL-CIO, which represents variety

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[3] Over the years, a great deal of original music has been composed for the Circus. In 1942, Igor Stravinsky wrote an "Elephant Ballet" for the Circus; Deems Taylor wrote a musical suite entitled "Through the Looking-Glass"; and other compositions have been written by Victor Young, Henry Sullivan, Richard Barstow and many others.

[4] The Circus's choreographer, Bill Bradley, has worked throughout the entertainment industry. With the Circus's former director, Richard Barstow, he staged the shows at New York City's Latin Quarter; he also worked in the theatre with the internationally famous choreographer Jerome Robbins and others.

performers in musical and variety shows presented at Radio City Music Hall, on Broadway and other musical and variety presentations that the respondents treat as tax exempt. The musicians in the Circus Band are all members of the American Federation of Musicians.

(b) *Scholarly and critical views of the Circus's dramatic, choreographic and musical character*

Petitioners submitted the sworn statements of officers and employees of the Circus attesting to its elaborate production requirements and its choreographic, musical and dramatic elements. (A. 40a-44a, 46a-48a.) Petitioners also submitted numerous published reviews of the Circus by the drama critics of major American newspapers and theatrical periodicals, and an essay by a Ph. D. candidate at the New York University Drama School summarizing the academic and historical view of the circus as theater.

By contrast to the extensive showing made by petitioners, respondents submitted only a self-serving affidavit of the City of New York's attorney timing the various Circus acts and offered no expert analysis of the Circus or any independent opinion to rebut petitioners' showing that the Circus is a dramatic, choreographic and musical performance.

3. Petitioners' Unrebutted Showing of Discriminatory Legislation and its Arbitrary Application and Selective Enforcement

In imposing a uniform statewide tax on amusement admission charges, the admissions tax law expressly exempted, among other things, "dramatic or musical arts performances." The state law defined this exemption to include "[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live *dramatic, choreographic* or *musical performance.*"[5] (Emphasis added.)

When the Legislature enacted this law in 1965, it deleted from the definition of "dramatic or musical arts admission charge" the language contained in a predecessor law of the City

[5] New York Tax Law §1105 (f)(1). This provision is set forth, in relevant part, at p. 3, *supra.*

of New York which had expressly excluded from the exemption "circuses, ice shows [and] aquashows".[6]

On August 25, 1965, 24 days after the effective date of the law which deleted the exclusion of "circuses, ice shows [and] aquashows", and unbeknownst to petitioners until shortly before commencing this action, the State Tax Commission, through its counsel, Edward H. Best, issued a private letter ruling, declaring that ice shows fell within the "dramatic or musical arts performances" exemption to the admission tax imposed by the new law.[7] (A. 49a.)

In 1973 and 1974, at the suggestion of the State Tax Commission and without objection from the State or City, bills were introduced and passed by the New York State Legislature containing a clarifying amendment to §1105(f)(1) of the Tax Law specifically to include circuses within the coverage of the admissions tax exemption.[8] The legislative purpose in enacting the amendments was reflected in the title to the 1974 bill which read: "An Act [t]o amend the tax law, in relation to clarifying and equalizing the exemptions granted and the taxes authorized under existing law for admissions to certain live dramatic, choreographic or musical performances." Both attempts at equalizing the tax treatment were, however, vetoed by New York Governors Rockefeller and Wilson. Each Governor purposefully and intentionally elected to continue to exclude

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[6] §G46-1.0 (3)(a) of the Former Administrative Code of the City of New York, Chap. 46, Title G, entitled "Amusement Tax" (predecessor of the current State and City laws)(enacted by Local Law 1954, No. 37, June 18, 1954, as amended by Local Law 1961, No. 72, October 20, 1961)(repealed by Local Law 1965, No. 72, July 22, 1965 and Laws of 1966, ch. 772, effective August 1, 1965).

[7] On January 2, 1976, after the present action had commenced and petitioners had become aware of the ruling, the State Department of Taxation and Finance issued an opinion revoking it and finding that ice shows did not fall within the admissions tax exemption. Respondents have nonetheless refrained from ever collecting the tax from ice shows. The reversal of position has since been successfully challenged by the Ice Capades. In Metromedia, Inc. v. New York State Tax Commission, (Sup. Ct. Albany Co., Jan. 12, 1979)(Pitt, J.) appeal pending (3d Dep't), the court granted summary judgment declaring the Ice Capades to be exempt from the admissions tax.

[8] N.Y.S. 1336-A, 1973-1974 Sess. (1973); N.Y.S. 9605, 1973-1974 Sess. (1974).

circuses from the exemption noting that substantial revenue losses would result if this "special exemption" were created.[9]

The State Tax Commission admitted in its answer herein that no sales tax had been paid or required to be paid for admission charges to the Walt Disney arena show "Disney on Parade", or to ice shows or other similar shows, on the ground that they were "live dramatic, choreographic or musical performances" and exempt under Tax Law §1105(f)(1). (A. 35a.)

Respondents also imposed no tax on a Spanish circus arts and ethnic dance show entitled "Estrada," performed in 1977.

Respondents also imposed no tax on "The Big Apple Circus," a wholly intrastate circus, which was performed during the summer of 1977 on the property of a State Governmental Authority. The Big Apple Circus, supported by public funds, was a one-ring circus performed in a tent and consisted of clown acts, tumbling, trapeze acts, juggling and dancing accompanied by music played by a small circus band. The performers included paid professionals. (A. 45a.)

4. Relevant New York Proceedings

Petitioners alleged and proved numerous instances of nonenforcement of the tax laws against other circuses and similar shows in support of their claim of "arbitrary," "discriminatory," and "unconstitutional" application of the tax laws. In 1974, petitioners sought discovery from the respondent State Tax Commission of all relevant information regarding (1) respondent Tax Commission's intent behind its selective enforcement of the laws; and (2) the pertinent factors considered by the Commission in determining the application of the exemption to "circuses, ice shows [and] aquashows" and other "dramatic or musical arts performances."

The discovery requested included all ruling letters, memoranda thereon, supporting documents, and other materials dealing with rulings of the Tax Commission that ice shows (such as the Ice Capades) were exempt from the admissions tax. Also sought were all documents relating to the application

[9] Governor's Memorandum of Disapproval of N.Y.S. 1336-A (June 22, 1973); Governor's Memorandum of Disapproval of N.Y.S. 9605 (June 13, 1974).

of the tax to petitioner's Circus, as well as the Walt Disney arena show, carnivals, rodeos, and other dramatic and musical arts performances. Petitioners also requested essentially the same documents under the New York Freedom of Information Act (Article 6 of the Public Officers Law, as amended by 1974 N.Y. Laws, ch. 578).

The Commission responded by producing an excerpted copy of the then already published private letter ruling (A. 49a.) exempting ice shows from the admissions tax, along with several other previously published documents. The Commission, however, refused to produce any of the other documents requested and also failed and refused to schedule a deposition.

Petitioners thereafter moved to compel disclosure and their motion was, in part, denied on the ground that the documents sought were "secret" tax returns, under Tax Law §1146, (*see* p. 13, *infra)* and, in part, granted as to an examination before trial of the Tax Commission. However, the court's opinion and order dated March 23, 1976, scheduling a deposition on March 29, 1976, was not received by the parties until March 31, 1976. Thereafter petitioners twice requested the respondent State Tax Commission to fix an alternate date for examination. The respondent, however, failed and refused to reschedule the deposition.

Following the Commission's failure to comply with this order, petitioners renewed their discovery motion and the respondent Tax Commission thereupon cross-moved for summary judgment asserting that its construction and application of the tax law against petitioner's Circus were proper.

Petitioners then cross-moved for summary judgment but only with respect to the statutory construction issue. With respect to their constitutional claims, petitioners argued that factual issues of discriminatory enforcement had been presented which, in light of the lack of discovery and a hearing on the matter, could not be decided by summary judgment. (A.36a.) The respondent City of New York, thereafter, also moved for summary judgment.

The Supreme Court, New York County, Hon. George Postel, rendered a decision against petitioners on both the

statutory construction issue,[10] *and based on the pleadings alone,* on the constitutional issues.

Petitioners were afforded no discovery or hearing on their constitutional claims and the Court's earlier granting of the Tax Commission's examination before trial was thereby nullified.

Following the court's decision, but before judgment was entered, petitioners learned of the non-enforcement of the tax laws against the state-supported, wholly intrastate, "Big Apple Circus." Petitioners thereupon moved to renew and reargue the prior decision of Justice Postel, arguing again, among other things, that they were entitled to discovery of the direct evidence in the sole possession of respondents on the crucial element of their constitutional claims, and seeking a hearing. Petitioners also sought leave to add to their complaint the allegation of discrimination against interstate commerce based on the facts regarding the "Big Apple Circus." The motion was denied by Hon. Irving Kirschenbaum, who adhered to the prior decision of retired Justice Postel and issued the final order and judgment (A.19a.)

This order and judgment was unanimously affirmed without opinion by the Appellate Division. (A.27a.) The New York Court of Appeals dismissed petitioners' appeal as of right, on the ground "that no substantial constitutional question is directly involved" (A.30a.) That Court also denied petitioners' motion for leave to appeal.

REASONS FOR GRANTING THE WRIT

1. THE STATE AGENCIES AND COURTS FRUSTRATED PETITIONERS' PROCEDURAL DUE PROCESS RIGHTS BY DENYING DISCOVERY AND A HEARING ON ESSENTIAL ELEMENTS OF THEIR CONSTITUTIONAL CLAIMS

A writ of certiorari should be granted because the decisions below, if permitted to stand, prevent a taxpayer who raises constitutional claims under the Equal Protection and Due

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[10] The Court held that Tax Law §1116(d)(2)(B) was dispositive of the issue of statutory construction in "explicitly provid[ing] that circuses [were] not to be included in the admissions tax exemption where any professional performer or operator participates for compensation." (A. 9a.)

Process Clauses from ever reaching trial on the merits in an action brought against State taxing authorities, and will have a similar effect on a broad range of plaintiffs seeking to vindicate their constitutional rights in state courts. The courts below denied petitioners access to the only available evidence on a crucial element of their constitutional claims by refusing to grant discovery and a hearing on the issue, and have then whipsawed them by summarily dismissing those claims for failure to show the very evidence which only the requested discovery and a hearing could have produced.

Respondents have the sole possession of all direct evidence pertaining to their intent and purpose in interpreting and in enforcing the admissions tax laws. Petitioners showed instance after instance of selective enforcement evidencing arbitrary and discriminatory application of these laws. They sought to document the discriminatory intent by obtaining direct evidence through the only means possible—discovery. By holding that petitioners' constitutional claims must be dismissed because they failed to prove what only discovery of that evidence could prove—purposeful intent—the courts have allowed respondents to benefit from their wrongful refusal to produce the evidence.

The determination below that the documents sought were "secret" and thus privileged under Tax Law, §1146 (McKinney's 1967) is baseless. (A.2a.) Section 1146 exempts from disclosure *tax returns* or reports filed in connection with them. No such return or report was ever sought by petitioners in their discovery requests. A simple deletion of a taxpayer's name appearing on a requested document would have sufficed to safeguard whatever arguably privileged information may have even indirectly been involved.[11]

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[11] This was in fact the method employed in connection with the 1965 private letter ruling exempting ice shows. In providing an excerpted copy of the requested letter, the Commission stated: "the name of the ice show and the name of the firm making the inquiry have been deleted." The Court has stated in Henry v. Mississippi, 379 U.S. 443 (1965), that although state procedural rules will be recognized when they serve a legitimate state interest, to the extent that that interest can be satisified without interfering with the vindication of one's constitutional rights, the alternative method should govern. Thus, while the State may have had a legitimate interest in preventing disclosure of truly "secret" information, that interest could have been satisfied by merely excising the names of specific parties disclosed in the requested documents. This approach would be consistent with the disclosure provisions of §§6103 and 6110 of the Internal Revenue

While this Court has consistently required a showing of something more than mere lack of uniformity in the application of a challenged law to constitute a violation of the Equal Protection and Due Process clauses of the Constitution, *Rowley* v. *Chicago N.W. Ry.*, 293 U.S. 102, 111 (1934), *Mackey Telegraph Co.* v. *Little Rock*, 250 U.S. 94, 100 (1919), it has never allowed a state court to preclude such a showing by sanctioning a defendant's stone-walling of all available evidence.

This Court has held that a showing of purposeful and intentional unfairness is necessary for a finding of unconstitutional application of the laws. *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Charlestown Ass'n* v. *Alderson*, 324 U.S. 182, 190-91 (1945).[12] This made it incumbent upon the courts below to grant the discovery requests and a hearing on the constitutional issues of respondents' purpose and intent in taxing circuses while exempting other "dramatic, choreographic or musical performances." It is inherently unfair and repugnant to fundamental principles of justice and due process to require the showing of a certain element of proof to preserve a constitutional claim, and then to deny all access to that proof. *Cf., Endicott-Johnson Corp.* v. *Smith*, 266 U.S. 291 (1924); *Turpin* v. *Lemon*, 187 U.S. 51 (1902); *Merchant* v. *Pennsylvania Ry. Co.*, 153 U.S. 380 (1893); *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), *overruled on other grounds, Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

The Court's recent decision in *Herbert* v. *Lando*, 441 U.S. 153 (1979), reflects this well-established principle of American jurisprudence. In *Lando*, the plaintiff, as a "public figure," was required as an essential element of his defamation action, to prove actual malice on the part of the media defendants, *Gertz*

Code. These sections, in ensuring the confidentiality of tax returns and related information, provide for the public disclosure of written determinations and background file documents following the deletion of names, addresses and any other identifying details of the person to whom the document pertains or of any other individual.

[12] This requirement was recently reiterated in City of Mobile v. Bolden, 48 L.W. 4436 (April 22, 1980). Mr. Justice Stewart, writing for a plurality of the Court, noted the "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection clause of the Fourteenth Amendment. See, Washington v. Davis, 426 U.S. 229; Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252; Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 252."

v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Company* v. *Sullivan*, 376 U.S. 254 (1964). In seeking to meet this requirement plaintiff sought to depose the defendants at length and sought an order compelling the defendants' response. The defendants had refused to answer on First Amendment freedom of speech grounds.[13]

Rejecting the Second Circuit's holding that the information sought was constitutionally privileged, this Court noted that prohibiting discovery departed from "firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving [an essential element of his cause of action]." 441 U.S. at 169. In reversing the Court of Appeals and compelling discovery, this Court noted that the bar to discovery, had it been upheld, would have "erect[ed] an impenetrable barrier" to the plaintiff's ability to prove the elements of his cause of action.

Similarly, petitioners sought discovery of direct evidence of an essential element of their cause of action—purposeful intent—and a hearing thereon. Here too, an impenetrable barrier has prevented them from proving their case. Under *Lando*, this amounts to an unconstitutional suppression of petitioners' due process rights.

As this Court said in *United States* v. *Nixon*, 418 U.S. 683, 710 (1974), in rejecting another attempt to bar discovery:

> [W]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for truth.

The refusal below to grant discovery and the summary dismissal of petitioners' constitutional claims without affording a hearing on the merits were significant deviations from accepted principles of due process. The consequential effect on petitioners' ability to preserve other fundamental constitutional rights justifies the grant of the writ of certiorari.

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[13] The respondent State Tax Commission's refusal to comply with the discovery requests differs substantially from the defendant's refusal in Lando. Unlike the publisher in Lando, the Tax Commission has not advanced a claim of constitutional privilege. The balance thus weighs even more heavily in favor of compelling discovery in the case at bar.

If the summary dismissal of petitioners' constitutional claims below, without discovery or a hearing, is permitted to stand, there will be a chilling effect on all who seek to vindicate constitutional rights in state courts. Faced with this clear expression of the state courts' reluctance to entertain constitutional claims, potential litigants will be strongly motivated to pursue their constitutional claims solely in the federal courts.

2. THE ARBITRARY AND DISCRIMINATORY APPLICATION OF THE TAX LAW VIOLATED THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

In the fifteen years since the enactment of §§1105 (f)(1) and 1101(d)(5) of the New York State Tax Law and §§A46-2.0 and A46-1.0 of the Administrative Code of the City of New York, respondents have engaged in systematic, arbitrary and discriminatory application of these statutes in direct contravention of petitioners' equal protection and substantive due process rights under Section 1 of the Fourteenth Amendment and in violation of the Constitution's Commerce Clause, Art. 1, Sec. 8, clause 3. Among various examples of nonenforcement of the admissions tax are ice shows, the Disney arena show "Disney on Parade", a Spanish circus and variety show, and even a one-ring publicly funded circus. Petitioner's Circus, shown to have been at least equal to the others in musical, choreographic and dramatic content, has, however, been denied the benefit of the exemption.

A.

In the face of this extensive pattern of nonenforcement of the tax against performances similar to petitioner's Circus, respondents and the courts below offered no rational basis for the discriminatory application of the laws.

The sole basis offered by the courts below for the exclusion of petitioner's Circus from exemption under the law involved the Legislature's desire to provide economic relief for the "legitimate theater." From this, the court concluded that:

> Different economic factors affect arena shows, such as circuses. For example, they can accommodate a far larger

> audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense. (A. 16a.)

Far from justifying the unequal treatment, this sole distinguishing basis highlights the discriminatory application. Respondents' unequal application of the laws not only involved similar forms of entertainment performed in arenas generally, but very often in the same arena as the Circus. It is no justification to use location as the basis for different treatment under the statute and then to ignore the fact that those similar non-taxed performances are held in the very same building.

B.

The court below also held, as a matter of law, that petitioners' claims of discriminatory and arbitrary treatment could "at most [amount] to an allegation that the [respondent] Tax Commission mistakenly ruled that some other kinds of arena shows were exempt." (A. 13a). The court concluded that since petitioners "merely alleged that no sales tax had been required by the [respondents] to be paid" on admissions to similar shows "the complaint did not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection." (A. 13a).

Petitioners never alleged mistake or mere failure on the part of respondents to apply the tax to other forms of entertainment.

The complaint was explicit in its allegations that the selective enforcement of the tax law was "arbitrary, unlawful, unconstitutional and discriminatory." (Complaint ¶¶18(d), 19.) In fact, the State's failure to enact corrective legislation because of the potential loss of substantial tax revenues belies the claim that the failure to exempt circuses was neither purposeful nor intentional. The court's dismissal of petitioners' constitutional claims for failure to allege the apparently magical words "willfulness or fraud" is in direct conflict with several of this Court's decisions. (A.13a.)

Addressing the requirements for alleging the unconstitutionality of state statutes, this Court in *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928), said:

> There are various ways in which the validity of a state statute may be drawn in question on the ground of its repugnance to the Constitution of the United States. *No particular form of words or phrases is essential,* but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. (Emphasis supplied.)

Furthermore, this Court held in *Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, 298 (1949), that:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Petitioners alleged that the laws at issue are arbitrary and discriminatory, both on their face and as applied. The instances of alleged discriminatory application were alleged with particularity. There can be no question that the claims and the grounds therefor were properly pleaded and brought to the attention of the state courts.[14]

That the courts below would have preferred the selection of different adjectives for claiming unconstitutionality is a wholly insufficient ground on which to dismiss a valid claim of infringement of constitutional rights.

3. IN EXCLUDING CIRCUSES FROM THE EXEMPTION FOR "DRAMATIC OR MUSICAL ARTS PERFORMANCES" THE STATUTE DEPRIVES PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH, DUE PROCESS AND EQUAL PROTECTION

In construing the exemption from the admissions tax afforded "dramatic or musical arts performances" the court below determined that the Legislature had intended to exclude

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[14] This Court is not precluded from granting certiorari even if it is contended that the dismissal was based on a purely state ground, i.e., the form of the pleadings. As noted in Ward v. Love County, 253 U.S. 17 (1920), a state court's use of untenable non-federal grounds as the basis for its decision will not invoke the rule that the Supreme Court will not review the judgment of a state court decided upon an independent non-federal ground.

circuses as a class from eligibility under the exemption.[15] (A. 10a.)

In spite of the uncontroverted evidence presented of the dramatic, musical and choreographic nature of petitioner's "Greatest Show on Earth" and the elimination from the statute of the language which had formerly specifically excluded "circuses, ice shows [and] aquashows" from the exemption, the court below summarily held that the petitioner's Show was excluded from coverage under the exemption because it was *sui generis* — "a beautifully customed [*sic*], well-produced circus." (A. 10a).

Although other forms of entertainment, similar to circuses in content, are to be reviewed on a case by case basis and accorded the exemption when qualified,[16] circuses, as an art form, however dramatic, musical or choreographic they may be, are as a class denied the benefits of the exemption. By so construing the statute, the court below has rendered it unconstitutional.

This irrational exclusion of an entire class of entertainment from the benefits of the exemption amounts to an unconstitutional infringement upon the petitioner Circus's freedom of speech guaranteed by the First Amendment as well as its rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment.

Entertainment is constitutionally protected under the First Amendment. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). That the entertainment form will generate a profit or is in any sense a business does not disqualify it from First Amendment protection. *Winters v. New York,* 333 U.S. 507 (1948).

In *Speiser v. Randall,* 357 U.S. 513, 518 (1958), this Court held unconstitutional a California statute denying a tax ex-

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[15] §§1105(f)(1) and 1101(d)(5) of the New York State Tax Law and §§A46-2.0(f)(1) and A46-1.0(d)(5) of the Administrative Code of the City of New York.

[16] Thus, the court in Metromedia, Inc. v. New York State Tax Commission, *supra,* in holding the Ice Capades to be exempt from the admissions tax under §1105(f)(1), noted that the mere fact that a presentation involved ice skating neither precluded nor proved its choreographic and musical nature and that it was accordingly necessary to review each show individually. Circuses, however, have been categorically denied similar case by case analysis.

emption to certain forms of speech, stating: "it cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." It further cautioned that "to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*

The court below offered no compelling state interest justifying the infringement of petitioner Circus's first amendment rights. *See, Roe v. Wade,* 410 U.S. 113 (1973), *Sugarman v. Dougall,* 413 U.S. 634 (1973).

The court's notion that the arena staging of petitioner's Circus affords it greater opportunity to meet its production costs and that thus the Circus is without any need for the economic relief intended by the Legislature, is unsound. It ignores the far lower costs of production of other forms of entertainment often performed in arenas and granted the exemption, such as rock concerts.

The absence of a rational basis for the exclusion of all circuses from coverage under the exemption renders the statute as construed by the New York courts violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment. A state may not place a value judgment upon the worth of a particular form of expression and, absent a compelling interest or rational basis for so doing, burden its exercise. *See, O'Brien v. Skinner,* 414 U.S 524, 530-531 (1974); *United States Dep't of Agriculture v. Moreno,* 413 U.S. 528, 538 (1973).

CONCLUSION

The decisions below prevent taxpayers from vindicating their constitutional rights in the state courts if the evidence they require is in the hands of taxing authorities. The preclusion of all access to direct evidence of an essential element of petitioners' constitutional claims violates fundamental principles of procedural due process. Dismissing constitutional claims on the basis of the wording of the pleadings despite a *prima facie* showing of discriminatory and selective enforcement of state law is similarly objectionable. Furthermore, the absence of a rational basis for excluding all circuses from the admissions tax exemption while according the exemption to similar types of

entertainment violates the First and Fourteenth Amendments to the United States Constitution. For these reasons a writ of certiorari should issue to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

Respectfully submitted,

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May 20, 1980

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 7 read on this motion, SUBMITTED

	Papers Numbered
No. 72 on Calendar of Oct. 29, 1975	
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-7
Answering Affidavit	
Replying Affidavit	
Affidavit	
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion # 73 this date.

Motions numbered 72 and 73 on the calendar of October 29, 1975, are consolidated for disposition and disposed of as follows:

That branch of the motion by plaintiff for an order compelling production of specified documents is denied, and the cross motion for a protective order as regards the aforesaid production is granted.

The documents sought are "secret" and not subject to discovery by movant, who has failed to demonstrate that adequate special circumstances exist warranting their production (Tax Law, § 1146; Public Officers Law, § 88; see Cirale v. 80 Pine Street Corp., 35 N.Y. 2d 113).

The part of the motion for an order directing an examination before trial is granted, and the part of the cross motion for an order denying said examination before trial is denied.

The examination shall take place at Special Term, Part II of this court at 10 A.M., on March 29, 1976, or as agreeable to the parties. All rulings necessary with respect to said examination before trial shall be referred to the justice presiding thereat.

Dated March 23, 1976 S/.....
J.S.C.

Briefs: Plaintiff's xx Defendant's x Petitioner's Respondent's Relator's Briefs

County Clerk's No. 10219, 1975
Spec I Liber R73 Line 9, 1975

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL TERM PART I,

NEW YORK COUNTY

AT THE COURTHOUSE THEREOF, 60 CENTRE STREET,

NEW YORK, NEW YORK, 10007

PRESENT: HON. GEORGE POSTEL

Justice.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC.

—against—

NEW YORK STATE TAX COMMISSION et ano.

The following papers numbered 1 to 6 read on this motion, SUBMITTED

No. 73 on Calendar of Oct 29, 1975

	Papers Numbered
Notice of Motion—Order to Show Cause—and Affidavits Annexed Exhibits	1-5
Answering Affidavit	
Replying Affidavit	
Affidavit of Service	6
Affidavit	
Pleadings—Exhibit	
Stipulation—Referee's Report—Minutes	
Filed Papers	

See Companion Motion #72 this date.

Upon the foregoing papers this motion is disposed of in accordance with decision rendered in companion motion numbered 72 on the calendar of October 29, 1975.

Filed
Mar 23 1976
New York
Co. Clerk's Office

Dated March 23, 1976

S/.....
J.S.C.

County Clerk's No. 10219, 1975
Spec I Liber R-76 Line 1, 1975

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

POSTEL, J.:

Plaintiffs move pursuant to CPLR 2221 for leave to renew the prior order of this court which denied their motion for an order directing the defendant New York State Tax Commission (hereinafter referred to as "Commission") to produce certain documents. The Commission cross-moves for a protective order pursuant to Article 31 of the CPLR, vacating plaintiffs' notice and denying production of the documents referred to therein; and also for an order pursuant to CPLR 3212 dismissing the complaint herein and directing that judgment be entered herein in favor of the Commission on the grounds that the action has no merit as a matter of law.

Plaintiffs cross-move for summary judgment granting a declaratory judgment adjudging that the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. is exempt from the provisions of the New York State Tax Law and from the provisions of the Administrative Code of the City of New York, which require the collection of state and city sales taxes on admission charges, and directing that the second cause of action be severed.

This is an action for a declaratory judgment wherein plaintiffs seek an adjudication that the annual performances at the Madison Square Garden Center and elsewhere in New

York State presented by the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. (the "Circus") are exempt from the provisions of the New York State Tax Law and the New York City Administrative Code requiring the collection of admissions taxes for certain types of public entertainment as tax-exempt "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" (Tax Law §§1105 [f][1], 1101 [d][1]; N.Y.C. Admin. Code §§A46-2.0 [f][1]; A46-1.0 [d][5]).

The circus and its coplaintiff, Ruth E. Lutzic, who purportedly sues on her own behalf as a taxpayer and circus patron and for all others similarly situated as a class, contend that the Circus presents live "dramatic or musical arts performances" within the meaning of the exemption provided in section 1105 (f)(1) of Article 28 of the Tax Law, which also defines a "dramatic or musical arts admission charge" in section 1101 (d)(5) as one charged for "admission to a theatre, opera house, concert hall, or other hall or place of assembly for a live, dramatic, choreographic or musical performance."

Therefore, plaintiffs argue the Circus is exempt from the collection of the state and city taxes on admission charges.

Defendant City of New York says that the admission charges to performances of the plaintiff circus are subject to state and city sales tax and have been subject to such taxes for all periods involved in this action. The city tax provisions in question are identical with the state tax provisions, so that judgment for one defendant would require judgment for the other.

As additional second and third grounds of the first cause of action for declaratory judgment, plaintiffs contend that the statutes in question are arbitrarily, capriciously, and unconstitutionally applied in that other entertainment extravaganzas similar to the circus, such as ice shows and "Disney on Parade," have been granted administrative exemptions from the collection of admission taxes under the above sections of the Tax Law, and that the statutes, if construed as the defendants urge, are unconstitutional on their face. These constitutional grounds based on the Equal Protection and Due Process provisions of both the United States and the New York State Constitutions, as well as on the First Amendment, present, say the plaintiffs,

factual questions which cannot and should not be decided by summary judgment. These secondary contentions therefore preclude defendants' cross-motion for summary judgment and need not be reached if the court grants plaintiffs' motion based on the statute issue.

However, the defendants say that the plaintiffs' argument with respect to discriminatory enforcement of the tax statutes does not preclude the granting of summary judgment to the defendants city and state at this time, as plaintiffs contend, because, as a matter of law, the complaint does not allege the kind of discrimination that constitutes a denial of equal protection. Only a purposeful, invidious, intentionally unfair discrimination in enforcement of a statute may amount to a denial of equal protection. Plaintiffs merely allege that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney on Parade"), ice shows, all of which are similar in nature and character to the Ringling Bros. Circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

Plaintiffs' complaint also contains a second cause of action for a refund to plaintiffs and members of the class of circus patrons of taxes previously paid for admission to the circus. This cause of action is not involved in the present cross-motions. Plaintiffs request that if summary judgment is granted to them on the first cause of action for a declaratory judgment, the two causes of action should be ordered severed pursuant to CPLR 3212 (e) (1). If summary judgment is granted to defendant on the first cause of action, the second cause of action necessarily fails.

Therefore, the primary issue presented by defendant's and plaintiffs' cross-motion is whether the Circus is subject to the state and city sales taxes on admissions.

The city tax involved herein is part of the City Sales Tax Law contained in Title A of Chapter 46 of the New York City Administrative Code. It is imposed pursuant to the authority granted to cities in Article 29 of the State Tax Law (Tax Law, §1210 [a]) to impose the taxes described in Article 28 of the Tax Law. Article 28 is the State Sales Tax Law and contains

the provisions of the state tax also involved in this action. The enabling act for the city tax requires that the city tax be identical with the state tax except in some limited respects not relevant to this action (Tax Law §1210 [a]).

The city tax in question (Admin. Code, §A46-2.0[f][1])* is imposed upon

> "(f) (1) *Any* admission charge where such admission charge is in excess of ten cents to or for the use of *any* place of amusement in the city of New York, *except charges for admission* to racetracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under the laws of the state of New York, or *dramatic or musical arts performances,* or motion picture theatres, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools." (Emphasis supplied.)

"Place of amusement" is defined as follows (Admin. Code, §A46-1.0[d] [1-0] corresponding to Tax L., §1101[d] [10]):

> "(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided."

Plaintiffs claim that the Circus falls within the statutory exemption provided in Section A46-2.0(f) (1) of the Code and Section 1105(f) (1) of the Tax Law for "dramatic or musical arts performances," which are defined as follows (Admin. Code, §A46-1.0[d] [5] corresponding to Tax L., §1101[d] [5]):

> "(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a *live dramatic, choreographic or musical performance.*" (Emphasis supplied.)

Thus, on its face, the exemption applies to admissions to performances of the kind which are commonly regarded as part of the dramatic or musical arts and which are customarily given in theatres, opera houses, concert halls and similar places.

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* This is the same in substance as Tax Law, section 1105(f)(1) except that the latter is statewide.

Obviously, the performance must be predominantly one of the dramatic or musical arts.

The Circus is a unique form of entertainment, customarily performed in a tent or arena.

It has been defined as follows:

> "2a. A circular enclosure surrounded by tiers and seats and usually covered by a large tent, for the exhibition of feats of horsemanship, acrobatic performances, etc. Also, the company of performers with their equipage or the performance itself." Webster's New International Dictionary of the English Language—2d ed., unabridged (G. & C. Merriam Co., 1947), p. 490.

Funk and Wagnalls dictionary defines "circus" as "1. A show in which feats of horsemanship, tumbling, strength, etc., are exhibited." (The Practical Standard Dictionary of the English Language [Funk & Wagnalls Co., 1931], p. 224.)

Everyone is familiar with the traditional circus acts, which are primarily feats of physical skill, strength and daring, interspersed with clowns for comic relief and trained animals.

It seems apparent, therefore, that a circus is not a dramatic or musical arts performance within the definition contained in section A46-1.0(d) (5).

However, were there room for doubt, it would be dispelled by section A46-7.0(d) (1) of the Administrative Code (corresponding to Tax Law, §1116 [d][1]).

Section A46-7.0(d) (1) exempts from the tax admissions which are otherwise taxable but whose proceeds inure exclusively to the benefit of various religious, charitable, educational, and governmental organizations. It provides the following:

> "(d) (1) Except as provided in paragraph (2) of this subdivision, any admissions all of the proceeds of which inure exclusively to the benefit of the following organizations shall not be subject to any of the taxes imposed under subdivision (f) of section A46-2.0 . . . ."

The paragraph (2) referred to in the provision above states in pertinent part (Admin. Code, §A46-7.0[d] [2]):

> "The exemption provided under paragraph (1) of this subdivision shall not apply in the case of admissions to:
>
> * * * *
>
> "(B) Carnivals, rodeos, or *circuses* in which any professional performer or operator participates for compensation . . . ." (emphasis supplied)

Accordingly, even in situations where an admission charge would be exempt because it inured to the benefit of an exempt organization, the Legislature has explicitly provided that circuses are not to be included in that exemption where any professional performer or operator participates for compensation.

The legislative history of the exemption for dramatic or musical arts performances supports the conclusion that circuses do not come within the exemption.

The provisions of the state and city sales tax laws involved in this action derive from the former City Admissions Tax imposed by Title G of Chapter 46 of the Administrative Code.

The exemption for dramatic or musical arts performances, like that for motion pictures, was based upon economic hardship.

High costs had drastically cut the number of theatres and the number of productions in the city. The 1960 season had been the most disastrous year on Broadway. It was feared that without relief from the tax on admissions not only would the legitimate theatre industry further decline but that the city's economy would be seriously affected because of the impact of such decline on hotels, restaurants, taxis, garages and other businesses in the city.

Similarly the concert stage, opera and ballet needed relief. Accordingly, the admissions tax was amended by Local Law No. 72 of 1961 to except dramatic or musical arts performances from the tax.

The amendment, in defining "dramatic or musical arts admission charge," expressly excluded circuses, along with ice

shows and aquashows, from the definition (Admin. Code, §G46-1.0(3a), as added by L.L. No. 72 of 1961, §1).

When the state sales tax was enacted (Tax. L., Art. 28, as added by L. 1965, ch. 93), the express exclusion of circuses, ice shows and aquashows in the definition of "dramatic or musical arts admission charge" was dropped as surplusage (Tax Law, §1101 [d] [5]). As the city tax imposed by Title A of Chapter 46 of the Administrative Code was required to be substantially identical with the state tax, the express exclusion of circuses, ice shows, and aquashows was dropped from the corresponding definition in the city tax.

Further, a viewing of the circus shows that it is not a "drama,"** that the music is background music, subsidiary to the circus acts, and that the choreographic elements are incidental, being performed by persons seemingly chosen for their athletic ability in climbing ropes and riding elephants rather than training in the dance.

In short, the performance is that of a beautifully customed, well-produced circus.

The language of the tax statutes involved and their legislative history make it clear that circuses do not come within the exemption for dramatic or musical arts performances. But, should there be any doubt, this doubt must be resolved in favor of defendants.

The rule is well established that a tax exemption is never presumed or inferred; the taxpayer must bring himself clearly within its ambit, for a tax exemption will not be granted unless its terms plainly and unequivocally apply and will not be recognized in case of any doubt. Matter of Young v. Bragalini, 3 N.Y.2d 602, 605, 606 (1958); Matter of Schwartzman, 262 App. Div. 635, 636 (3d Dept. 1941) affd. 288 N.Y. 568 (1942); People v. Brooklyn Garden Apartments, 283 N.Y. 373, 380 (1940); City of Rochester v. U.F.S. Dist. No. 4 of Livonia,

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** "Drama" is defined as "1. A composition, now usually in prose, arranged for enactment, and intended to portray life or character or to tell a story by actions and, usually, dialogue tending toward some result based upon them; a play. It is designed or composed as though designed, to be performed by actors on the stage." Webster's New International Dictionary of the English Language, 2d ed., unabridged (G. & C. Merriam Co., 1947), p. 782.

255 App. Div. 96, 102 (4th Dept. 1938); Matter of Bd. of Education, Jamestown v. Baker, 241 App. Div. 574, 575-576 (4th Dept. 1934), affd. 266 N.Y. 636 (1935); People ex rel. 300 Park Avenue, Inc. v. Goldfogle, 225 App. Div. 356, 359 (1st Dept. 1929).

In light of the multitude of tax cases dealing with similar arguments, plaintiffs' constitutional arguments are without merit.

The constitutional requirements of equal protection, as applied to taxation, are governed by well-established principles.

The rule is elementary that a tax need not follow a pattern of rigid uniformity. Bell's Gap R'd Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Lawrence v. State Tax Comm. 286 U.S. 276, 284 (1932). It has been said that "in taxation there is a broader power of classification than in some other exercises of legislation." Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329 (1913). A tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938); Carmichael v. Southern Coal Co., 301 U.S. 495, 509 (1937); Rast v. Van Demand & Louis, 240 U.S. 342, 357 (1916). Hence, if any reasonable purpose for the different tax treatment could have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. It is not necessary that the purpose be known with any certainty, nor need it be declared by the Legislature. Southwestern Oil Co. v. Texas, 217 U.S. 114, 126 (1910).

One of the clearest statements of just how far the Legislature may go in classifying for tax purposes is to be found in People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906), affirmed 204 U.S. 152 (1907). The court stated the general proposition as follows (p. 443):

> "All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it

> is unreasonable, but that does not make it unconstitutional, even if the result is double taxation."

It went on to point out that (p. 445):

> "The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts. . . ."

Thus, in Cook v. Marshall County, 196 U.S. 261, 274-275 (1905), a distinction between wholesale dealers and retail dealers for tax purposes was upheld. In Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910), a license tax which taxed rectifiers and blenders of distilled spirits was upheld, although the tax did not apply to distillers who did not rectify or blend their liquor. The case of Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910), sustained a tax on wholesale dealers in certain specified articles although it did not tax wholesale dealers in other articles.

In Singer Sewing Machine Co. v. Brickell, 233 U.S. 304 (1914), a tax was found valid although it was imposed on the business of selling sewing machines by traveling salesmen and was not imposed on the selling of such machines at an established place of business. It is proper to tax anthracite coal and not tax bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). The mining of iron ore where carried on by the owner may be taxed, while exempting such business if carried on by contractors. Oliver Iron Co. v. Lord, 262 U.S. 172 (1923). Manufacturers selling their own products may be excepted from a tax on merchants selling the same products. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Different tax treatment may be accorded to different classes of private bankers. Bradley v. Richmond, 227 U.S. 477 (1913). Tenants occupying real property may be taxed even though owner-occupants are not. Ampco Print.-Advs. Corp. v. City of N.Y., 14 N.Y.2d 11 (1964), appeal dismissed for want of a substantial federal question, 379 U.S. 5 (1964).

Plaintiffs' claim of discriminatory enforcement is also not warranted.

The discrimination in enforcement of a statute upon which courts will intervene must be purposeful, invidious, intentionally unfair. Snowden v. Hughes, 321 U.S. 1, 8 (1944), rehr. den. 321 U.S. 804 (1944); Di Maggio v. Brown, 19 N.Y.2d 283, 289-291 (1967); People v. Friedman, 302 N.Y. 75 (1950), app. dsmd. for want of subst. fed. question, 341 U.S. 907 (1951).

Mere mistake or errors in judgment by tax officials will not support a claim of discrimination violative of constitutional guaranties of equality. Charlestown Assn. v. Alderson, 324 U.S. 182, 190-191 (1945), rehr. den. 324 U.S. 888 (1945); Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918).

Moreover, it is not enough to show that a law has not been enforced against other persons as it has been enforced against the person claiming discrimination. Mackay Telegraph Co. v. Little Rock, 250 U.S. 94, 100 (1919). There must be something which amounts to an intention, or the equivalent of fraudulent purpose, to disregard the principle of uniformity. Rowley v. Chicago & N.W. Ry., 293 U.S. 102, 111 (1934), rehr. den. 293 U.S. 632 (1934). The burden of proof is on the taxpayer. (Charlestown Assn. v. Alderson, supra, 324 U.S. 182, 191 [1945]).

The complaint does not allege the kind of discrimination in enforcement needed to constitute a denial of equal protection.

It merely alleges that no sales tax has been required by the defendants to be paid "upon admission charges to the Walt Disney arena show ("Disney On Parade"), ice shows, and other shows all of which are similar in nature and character to the Ringling Bros. circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances."

At most it amounts to an allegation that the defendant Tax Commission mistakenly ruled that some other kinds of arena shows were exempt. It does not allege willfulness or fraud.

Indeed, the plaintiffs' argument that state and city officials had no objection to a change in the law to exempt circuses is

inconsistent with a claim of intentional or fraudulent discrimination.

Plaintiffs' contention that it has been deprived of due process of law has nothing to support it.

As the taxes with which we are concerned were enacted solely and simply as an exercise of the taxing power to raise revenue, the due process clause may not be availed of to condemn the statute. Shapiro v. City of New York, 32 N Y 2d 96, 102 (1973), app. dsmd. for want of a substantial fed. question, 414 U.S. 804 (1973), pet. for rehr. den. 414 U.S. 1087 (1973); Ampco Print-Advs. Corp. v. City of New York, 14 N.Y.2d 11, 24 (1964), app. dsmd. for want of a substantial fed. question, 379 U.S. 5 (1964).

Plaintiffs' contention that its First Amendment rights have been abridged is also without merit. Indeed, not only do plaintiffs fail to cite cases in support of their claim, but they also fail to tell us which First Amendment rights have been infringed.

Suffice it to say, the First Amendment does not grant immunity from the application of general laws. Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937); Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 194 (1946).

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. In re Jager, 29 S. C. 438, 7 S. E. 605, 609 (1888); Preston v. Finley, 72 Fed. 850 (Cir. Ct., Tex. 1896); City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959 (1898); Giragi v. Moore, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dsmd. for want of a substantial fed. question 301 U.S. 670 (1937); Arizona Pub. Co. v. O'Neil, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U.S. 543 (1938); Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So. 2d 368 (1947), app. dsmd. for want of a substantial fed. question 332 U.S. 749 (1947); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), cert. den. 346 U.S. 833 (1953); Alaska v. Journal Printing Company, 135 F. Supp. 169 (D. Ct., Alaska, 1955).

Even authors have been held subject to business taxes on receipts from licensing their works. Steinbeck v. Gerpsa, 4 N.Y. 2d 302 (1958), app. dsmd. for want of a substantial fed. question 358 U.S. 39 (1958).

The case of Grosjean v. American Press Co., 297 U.S. 233 (1936), illustrates the kind of tax which is constitutionally objectionable under the First Amendment. In the Grosjean case, the Court struck down a gross receipts tax which was imposed solely on newspapers having a large circulation. It was shown that the real objective of the tax was to suppress newspapers hostile to the incumbent administration.

The Court made it plain that it was not holding that there is a bar against taxing newspapers, saying (p. 250):

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of government."

The opinion went on to explain that the tax was being struck down because it was a deliberate device to limit the circulation of information. It spelled this out as follows (pp. 250-251):

> "But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.
>
> . . . The tax here involved is bad not because it takes money from the pockets of appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. . . ."

It is obvious that the taxes in question are purely revenue-raising measures, applicable to admissions to many forms of entertainment and not aimed at the circus.

The reasons for exempting the legitimate theatre from the taxes were economic, as were the Governors' vetoes of bills to exempt circuses.

Different economic factors affect arena shows, such as circuses. For example, they can accommodate a far larger audience than the usual theatrical production and therefore can better cover their costs, and they have wide public appeal which makes them capable of attracting large audiences. There has been no discrimination against plaintiffs in any constitutional sense.

Accordingly, the defendant's motion for summary judgment is granted to the extent of dismissing the second cause of action. The first cause of action, which seeks a declaratory judgment is not subject to dismissal merely because plaintiffs are not entitled to the declaration which they seek (Lanza v. Wagner, 11 N.Y.2d 317, at 334; James H. Meritt Plumbing, Inc. v. City of New York, 55 A D 2d 552). Therefore, that branch of defendants' cross-motion which seeks dismissal of the first cause of action is denied.

Plaintiffs' cross-motion for summary judgment is disposed of to the extent of adjudging that the plaintiff Circus is subject to the provisions of the New York State and New York City tax laws which require the billing and collection of sales tax on admission charges to the circus, and is otherwise denied. In view of the foregoing, plaintiffs' motion for leave to renew and that branch of the defendant's cross-motion which seeks a protective order, are denied as academic.

Settle judgment.

Dated: August 10, 1977

J. S. C.

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

RINGLING BROS.—BARNUM & BAILEY, COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK,

Defendants.

Index No. 10219/75

KIRSCHENBAUM, J.

Motions under calendar numbers 35 and 36 of March 6, 1978 are consolidated for disposition.

Plaintiffs move for leave to renew and reargue the decision of Mr. Justice Postel dated August 10, 1977. Defendants move for entry of an order, pursuant to CPLR § 9002, upon the decision of Mr. Justice Postel.

In this action for a declaratory judgment, Mr. Justice Postel, now retired, rendered a lengthy decision declaring that plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. (the "Circus") was liable for collection and payment of New York State and City sales taxes on admission charges to the Circus. Insofar as plaintiffs seek reargument, the motion is denied for want of a sufficient showing that the court overlooked or misconstrued any material principles of law or fact.

That branch of plaintiffs' motion which seeks renewal of their argument concerning denial of equal protection and discriminatory enforcement is based upon allegedly "newly discovered events." Specifically, plaintiffs allege that tickets to a Spanish dance and circus arts show entitled "Estrada" which was performed in September 1977, and to the "Big Apple Circus," which was performed during the summer of 1977, and to various ice shows, were not subject to the taxes complained

of. In opposition to these allegations, defendants assert that the Sales Tax Bureau of the Department of Taxation and Finance is continually conducting an on-going review of all taxable places of amusements, including circuses, for the proper imposition of admission charges, union collection and remission. Furthermore, the attorney for the defendant City of New York asserts that neither she nor the State Tax Commission was aware of the existence of the "Big Apple Circus," a small circus, until plaintiffs brought it to their attention. Plaintiffs have failed to demonstrate the existence of a triable issue as to any intentional and invidious plan of discrimination on the part of defendants: at most, all that plaintiffs have shown is more nonenforcement of the statute against others similarly situated, which is not enough (see *Matter of DiMaggio* v. *Brown,* 19 N.Y.2d 283, 290-91; *Matter of G&B Publishing Co., Inc.* v. *Department of Taxation and Finance, Sales Tax Bureau,* 57 A.D. 2d 18, 21, app. den., 42 N.Y.2d 807).

Plaintiffs have submitted additional factual affidavits in support of renewal. Accordingly, leave to renew is granted. However, even considering the additional factual affidavits, the court is unconvinced that Mr. Justice Postel overlooked or misconstrued any material principles of law or fact. Accordingly, on renewal, the court adheres to the decision of Mr. Justice Postel.

Plaintiffs' other arguments are equally without merit. The request by plaintiffs in their reply papers for leave to replead is denied. They have failed to satisfy the court that they have good ground to support their proposed cause of action for alleged discriminatory enforcement against interstate commerce, (see CPLR § 3211 subd. e; *Ati, Inc.* v. *Ruder & Finn, Inc.,* 42 N.Y.2d 454, 461).

In view of this court's granting of renewal, defendants' motion, pursuant to CPLR § 9002, is denied.

Settle order.

Dated: April 18, 1978

.....

J.S.C.

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the County Courthouse in the City and County of New York on the 23 day of May, 1978.

PRESENT: HON. IRVING KIRSCHENBAUM, Justice

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC. and RUTH E. LUTZIC, suing on behalf of herself and other taxpayers similarly situated, *Plaintiffs,* —against— NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK, *Defendants.*	**Index No. 10219/75** **ORDER AND JUDGMENT**

This action having been brought by the plaintiffs against the defendants, demanding in the first cause of action of the complaint herein a declaratory judgment adjudging and declaring that charges for admission to the performances of the circus presented at the Madison Square Garden Center and elsewhere in New York State by the plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. are exempt from the taxes on admission charges imposed by Article 28 of the New York State Tax Law and by Title A of Chapter 46 of the New York City Administrative Code, as tax-exempt "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" (Tax Law, secs. 1105[f][1], 1101[d][5]; N.Y.C. Admin. Code, secs. A46-2.0[f][1]; A46-1.0[d][5]), and for other related relief, and demanding in the second cause of action of the complaint a refund, to plaintiff Lutzic and members of the class of circus patrons, of taxes previously paid on admission charges to the said performances of the circus;

And the defendants, New York State Tax Commission and The City of New York, having timely appeared and served

answers and counterclaims and having requested declaratory and other relief in their favor and the plaintiffs having timely served replies to said counterclaims, and the plaintiffs having moved at Special Term, Part I, of this Court for an order compelling the defendant New York State Tax Commission to appear for an examination before trial and to produce certain documents, and the defendant New York State Tax Commission having moved at Special Term, Part I, for a protective order, and this Court by Hon. George Postel, J.S.C., sitting in Special Term, Part I, having heard and determined these motions by separate decisions and orders, dated March 23, 1975, denying that part of plaintiffs' motion that was for an order compelling production of specified documents and that part of said defendant's cross-motion that was for an order denying said examination before trial, and granting that part of plaintiffs' motion that was for directing an examination before trial and that part of said defendant's cross-motion that was for a protective order with respect to said documents;

And the plaintiffs having moved for leave to renew their motion for the production of certain documents, and the defendant New York State Tax Commission having cross-moved for a protective order and for an order granting summary judgment dismissing the complaint and directing that judgment be entered in its favor, and the plaintiffs having cross-moved for summary judgment in their favor and against the defendants New York State Tax Commission and City of New York, and the defendant City of New York having requested that summary judgment be granted in favor of the defendants City of New York and New York State Tax Commission;

Now, upon reading and filing the summons, dated February 4, 1972; the complaint, verified February 4, 1972; the answer of the defendant New York State Tax Commission, verified June 29, 1972; the answer of the defendant City of New York, verified May 25, 1972; the reply to the counterclaim of defendant New York State Tax Commission, verified July 11, 1972; the reply to the counterclaim of defendant City of New York, verified July 11, 1972; and

Upon plaintiffs' notice of motion, dated January 3, 1977, for leave to renew their motion for an order compelling

defendant New York State Tax Commission to produce certain documents and the supporting affidavit of Lawrence W. Boes, sworn to January 3, 1977, with Exhibits A and B attached thereto, submitted in support of plaintiffs' motion, and

Upon the notice of motion by defendant New York State Tax Commission, dated January 20, 1977, for a protective order and for an order granting summary judgment, dismissing the complaint and directing that judgment be entered in favor of the defendant State Tax Commission, and the supporting affidavit of Robert W. Bush, sworn to January 20, 1977, with Exhibits A through H attached thereto, submitted in support of said defendant's cross-motion and in opposition to plaintiffs' motion, and

Upon the notice of plaintiffs' cross-motion, dated March 23 1977, for summary judgment in favor of the plaintiffs, granting a judgment declaring and adjudging that the plaintiff Ringling Bros.-Barnum & Bailey Combined Shows, Inc. is exempt from the provisions of Section 1105[f][1] of the New York Tax Law and from the provisions of Section A46-2.0[f][1] of the Administrative Code of the City of New York, imposing sales taxes on admission charges, and the supporting affidavits of Robert Thrun sworn to March 23, 1977, of Kenneth Feld, sworn to March 21, 1977, of Bill Bradley, sworn to March 17, 1977, and of William Pruyn, sworn to March 23, 1977, with Exhibits A through K attached thereto, and the letter of Lawrence W. Boes, dated March 25, 1977, addressed to Hon. George Postel, J.S.C., requesting oral argument and suggesting a viewing of the said plaintiff's circus by the Court and by counsel for all parties, submitted in support of plaintiffs' cross-motion and in opposition to said defendant's cross-motion, and

Upon the affidavit of Gale Zareko, sworn to March 25, 1977, submitted on behalf of defendant City of New York, requesting an adjournment of the hearing of the aforesaid motions and, alternatively, that summary judgment be granted in favor of the defendant City of New York by a judgment declaring that admission charges to circuses, and more particularly to circuses presented by plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc., are subject to State and City sales taxes, and

Upon the supplemental affidavit of Lawrence W. Boes, sworn to April 28, 1977, with accompanying Exhibit L, submitted in support of plaintiffs' cross-motion for summary judgment and in opposition to the defendants' cross-motions for summary judgment, and the letter of Lawrence W. Boes, dated April 28, 1977, addressed to Hon. George Postel, J.S.C., arranging for viewing of plaintiffs' circus by the Court and counsel for all parties, counsel for all parties having consented thereto, and

Upon the viewing of a performance of said plaintiffs' circus by the Court and counsel for all parties on May 3, 1977, with the exception of counsel for the State Tax Commission, and

Upon the supplemental affidavit of Gale Zareko, sworn to May 12, 1977, with Exhibits A and B attached thereto, submitted in support of said defendants' cross-motions for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment, and

Upon the reply affidavit of Lawrence W. Boes, sworn to June 1, 1977, with Exhibits M and N attached thereto, submitted in support of plaintiffs' cross-motion for summary judgment and in opposition to said defendants' cross-motions for summary judgment, and

Upon the letter of Louis J. Lefkowitz, Attorney General of the State of New York, by Robert W. Bush, Assistant Attorney General, dated June 13, 1977, and the Application for Authority under Section 1304 of the Business Corporation Law, dated August 23, 1971, the Consent by the State Tax Commission dated September 29, 1971, and the Certificate dated September 15, 1971, submitted in support of defendants' cross-motions for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment, and

Upon the affidavit of William Webb, II, sworn to June 17, 1977, submitted in support of plaintiffs' cross-motion for summary judgment and in opposition to defendants' cross-motion for summary judgment,

And the parties having submitted memoranda of law in support of their respective motions for summary judgment and their respective counsel having been heard on said motions, and

the Hon. George Postel, J.S.C., after due deliberation having duly made and filed a decision in writing on the 10th day of August, 1977,

And the plaintiffs having moved for leave to renew and reargue the prior decision of the Hon. George Postel, J.S.C., made on the 10th day of August, 1977, insofar as said decision (a) held and granted a declaratory judgment that the circus performances of plaintiff Ringling Bros.—Barnum & Bailey Combined Shows, Inc. are subject to the New York State Tax Law and the corresponding provisions of the New York City Administrative Code which impose state and city sales taxes on charges for admission to certain places of amusement; (b) dismissed the second cause of action brought by plaintiff Lutzic on behalf of herself and all other taxpayers similarly situated for a refund of taxes improperly collected; and (c) denied "as academic" plaintiffs' motion to renew its prior motion to compel production of certain relevant documents;

And the defendant State Tax Commission having moved that an order, pursuant to CPLR 9002, be signed and entered upon the said decision of Mr. Justice Postel, and

Upon plaintiffs' notice of motion, dated February 3, 1978 for leave to renew and reargue the prior decision of the Hon. George Postel, J.S.C. (who had retired as a Justice of this Court on the 21st day of December, 1977) made on the 10th day of August, 1977, and the supporting affidavit of Lawrence W. Boes, sworn to the 3rd day of February, 1978, with Exhibits A through I annexed thereto, and the supporting affidavit of Leonard Duane Easter, sworn to the 29th day of September, 1977, and Exhibit A annexed thereto, and the supporting affidavit of Michael D. Oden, sworn to the 3rd day of February, 1978, and the supporting affidavit of William Webb, II, sworn to the 30th day of August, 1977, and

Upon the affidavit of Gale Zareko, sworn to the 17th day of February, 1978, submitted on behalf of the defendant City of New York, and the affidavit of Robert W. Bush, sworn to the 22nd day of February, 1978, with an exhibit annexed thereto, submitted on behalf of the defendant State Tax Commission, in opposition to plaintiffs' motion for renewal and reargument, and

Upon the reply affidavit of Lawrence W. Boes, sworn to the 27th day of February, 1978, with Exhibits A and B annexed thereto, submitted in support of plaintiffs' motion for renewal and reargument and requesting leave to replead by adding the allegation that defendants have discriminated against interstate commerce in violation of Article I, Section 8, clause 3 of the U.S. Constitution, and

Upon the supplemental exhibit of Gale Zareko, sworn to the 3rd day of March, 1978, with exhibit "A" annexed thereto, submitted on behalf of the defendant City of New York in opposition to plaintiffs' motion for renewal and reargument and to plaintiffs' request for leave to replead, and

Upon the notice of motion of defendant State Tax Commission dated February 9, 1978, that an order be signed and entered upon the said decision of Mr. Justice Postel, pursuant to CPLR 9002, and the affidavit of Robert W. Bush, sworn to the 10th day of February, 1978, with a proposed order and judgment annexed thereto, and

Upon the affidavit of Lawrence W. Boes, sworn to the 21st day of February 1978, with Exhibits A and B annexed thereto, submitted by plaintiffs in response to said motion of the defendant State Tax Commission,

And the parties having argued said motions on the 6th day of March, 1978, and the plaintiffs having submitted in support of their motion for reargument and renewal, and the Hon. Irving Kirschenbaum, J.S.C. after due deliberation having duly made a decision in writing on the 18th day of April, 1978, granting in part and denying in part the plaintiffs' motion for renewal and reargument, and adhering to said decision of Mr. Justice Postel, and denying the motion of defendant State Tax Commission that an order be signed and entered on the decision of Mr. Justice Postel,

Now, on motion of Reavis & McGrath, Esqs., attorneys for the plaintiffs, and upon the affidavit of Lawrence W. Boes, sworn to the 12th day of May, 1978, and the exhibit annexed thereto, it is

Ordered that motions under calendar numbers 35 and 36 on March 6, 1978 are consolidated for disposition; and it is further

(1) ORDERED, ADJUDGED AND DECREED that the plaintiffs and defendants herein are entitled to a declaratory judgment in this action as to the first cause of action of the complaint herein, pursuant to CPLR 3001, declaring the rights and other legal relationships of the parties hereto; and it is further

(2) ORDERED, ADJUDGED AND DECREED that this Court does hereby declare that the rights of the plaintiffs and the defendants, with respect to the subject matter of the first cause of action of the plaintiffs' complaint, are as follows:

(A) Admission charges to performances of the circus presented by the plaintiff, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., at the Madison Square Garden Center in New York City and elsewhere in the State of New York and to performances of other circuses in the State of New York are subject to the provisions of Article 28 of the New York State Tax Law imposing sales taxes on admission charges and requiring the billing and collection of such taxes on such charges, and admission charges to such performances in the City of New York are also subject to the provisions of Title A of Chapter 46 of the Administrative Code of the City of New York imposing a sales tax on admission charges and requiring the billing and collection of such tax on such charges, for all periods when such provisions were and are in effect; and

(B) The performances of the circus presented by the plaintiff, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and performances of other circuses do not qualify under the exemption from said sales tax laws for "dramatic or musical arts performances" or as "a live dramatic, choreographic or musical performance" within the meaning of New York State Tax Law, secs. 1105[f][1] and 1101[d][5] and New York City Administrative Code, secs. A46-2.0 [f][1] and A46-1.0[d][5]; and

(C) The aforesaid State and City tax laws, both on their face and as applied by the defendants, do not violate or infringe the plaintiffs' constitutional rights under the Equal Protection Clauses of Article I, Section 11, of the Constitution of the State of New York or of the Fourteenth Amendment, Section 1, to the Constitution of the United States, the Due Process Clauses of said Constitutions, or the First Amendment to the Constitution of the United States, and it is further

(3) ORDERED that plaintiffs' motion for leave to renew and reargue that branch of the cross-motion of defendant New York State Tax Commission which seeks a protective order are denied as academic; and it is further

(4) ORDERED that that part of defendant New York State Tax Commission's cross-motion for summary judgment which seeks dismissal of the first cause of action of plaintiffs' complaint is denied; and it is further

(5) ORDERED that that part of defendants' cross-motions for summary judgment is granted to the extent of dismissing the second cause of action of plaintiffs' complaint; and it is further

(6) ORDERED, ADJUDGED AND DECREED that the second cause of action of plaintiffs' complaint shall be and hereby is dismissed; and it is further

(7) ORDERED that that part of plaintiffs' motion seeking leave to reargue the prior decision of Mr. Justice Postel, dated the 10th day of August, 1977, shall be and hereby is denied; and it is further

(8) ORDERED that that part of plaintiffs' motion seeking leave to renew said decision is granted; and it is further

(9) ORDERED that, on the renewal, the decision of Mr. Justice Postel, dated the 10th day of August, 1977, is adhered to; and it is further

(10) ORDERED that plaintiffs' request for leave to replead is denied; and it is further

(11) ORDERED that the motion of defendant State Tax Commission, pursuant to CPLR 9002, that an order be signed and entered upon the decision of Mr. Justice Postel dated August 10, 1977, shall be and hereby is denied.

ENTER

[SEAL] S/Justice of the Supreme Court

NORMAN GOODMAN, Clerk
Filed—June 9, 1978
New York County Clerk's Office

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 20, 1979

Present—Hon. Myles J. Lane, Justice Presiding
Arthur Markewich,
Vincent A. Lupiano,
Samuel J. Silverman,
David Ross, Justices.

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK,

Defendants-Respondents.

6622

An appeal having been taken to this Court by the plaintiffs-appellants from so much of the order and judgment (one paper) of the Supreme Court, New York County (Kirschenbaum, J.), entered on June 9, 1978, as determined that the circus performances are subject to State and City sales taxes, as set forth in appellants' notice of appeal, and said appeal having been argued by Mr. Sheldon V. Ekman of counsel for the appellants, by Mr. Francis V. Dow of counsel for respondent New York State Tax Commission, and by Gale Zareko of counsel for respondent The City of New York; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same is hereby affirmed. Respondents shall recover of appellants $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk
Docketed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.-BARNUM & BAILEY COMBIINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated, *Plaintiffs,* —against— NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK, *Defendants.*	NOTICE OF APPEAL Index No. 10219-1975

SIRS:

PLEASE TAKE NOTICE that the plaintiffs, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Ruth E. Lutzic, relying upon questions directly involving the construction of the due process and equal protection clauses of the Constitution of the State of New York (Article I, Section 6 and Section 11), and the due process and equal protection clauses of the Constitution of the United States (Fourteenth Amendment, Section 1), the interstate commerce clause of the Constitution of the United States (Article I, Section 8, clause 3), and the First Amendment to the Constitution of the United States, hereby appeal as of right to the Court of Appeals of the State of New York from the order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on November 20, 1979, which unanimously affirmed the order and judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on June 9, 1978, and plaintiffs appeal from each and every part of the order of the Appellate Division, as well as from the whole thereof.

Dated: New York, New York
December 26, 1979

Yours, etc.,

REAVIS & MCGRATH
Attorneys for Plaintiffs
345 Park Avenue
New York, New York 10022
(212) 752-6830

To:

Clerk of the County of New York
Hon. Robert Abrams
Attorney General of the State of New York

Attorney for Defendant
The New York State Tax Commission
Attention: Francis V. Dow, Esq.
The Capitol
Albany, New York 12224
(516) 474-7764

Hon. Allen G. Schwartz
Corporation Counsel of the City of New York
Attorney for Defendant The City of New York
Attention: Gale Zareko, Esq.
100 Church Street
New York, New York 10007
(212) 566-3328

Order of New York Court of Appeals, dated February 20, 1980, dismissing petitioners' appeal as of right and denying motion for permission to appeal.

1 Mo. No. 76
Ringling Bros.-Barnum & Bailey Combined Shows, Inc., et al.,

Appellants,

vs.

New York State Tax Commission and the City of New York,

Respondents.

(A) Motion to dismiss the appeal taken as of right granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

(B) Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
COMPLAINT NO.

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC Suing on Behalf of Herself and All Other Taxpayers Similarly Situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Plaintiffs, complaining of defendants, by Reavis & McGrath, its attorneys, allege:

AS AND FOR A FIRST CAUSE OF ACTION FOR A DECLARATORY JUDGMENT AND INJUNCTION:

1. (a) At all times hereinafter mentioned, the plaintiff Ringling Bros. and Barnum & Bailey Combined Shows, Inc. ("Ringling Bros.") was and still is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and is duly authorized and qualified to do business in the State of New York, pursuant to Article 13 of the Business Corporation Law of the State of New York, with an office within the City, County and State of New York.

(b) At all times hereinafter mentioned, the plaintiff Ruth E. Lutzic was and is a natural person residing in the County of Nassau, State of New York, who purchased tickets for and attended a performance of the Ringling Bros. Circus in 1971 with her family.

2. (a) The defendant New York State Tax Commission was and still is a duly authorized and existing agency of the

State of New York under and by virtue of Article 8 of the Tax Law of the State of New York.

(b) The defendant City of New York was and still is a municipal corporation duly organized and existing under and by virtue of state law and the New York City Charter.

3. Plaintiff, Ringling Bros., presents performances of the Ringling Bros. Circus in major cities throughout the United States and Canada, exclusively in indoor arenas or auditoriums. For over seventy (70) years, the Ringling Bros. Circus and its predecessors have been advertised and known to the general public as "The Greatest Show on Earth". The Ringling Bros. Circus includes traditional live circus acts such as clown acts, high wire and trapeze acts, aerial ballets, animal acts, teeterboard and perch acts and various other acts, such as jugglers, unicycles, tumblers, horsemen, etc., which traditional acts include various dramatic, choreographic and musical elements. In addition to these traditional circus acts, each performance of the Ringling Bros. Circus includes five production number extravaganzas which combine musical selections with a choreographic procession of circus performers in various costumes built around a central dramatic theme. Appropriate music for the production numbers, as well as music accompanying the acts, is provided by the Ringling Bros. Circus band. All of the performances of the Ringling Bros. Circus include live dramatic, choreographic and musical elements in combination and conjunction with traditional circus acts.

* * * *

15. Upon information and belief, no sales tax has been paid or has been required by defendants to be paid under Section 1105(f)(1) of the Tax Law upon admission charges to the Walt Disney arena show ("Disney On Parade"), ice shows, and other shows, all of which are similar in nature and character to the Ringling Bros. Circus, on the apparent ground that these shows are live dramatic, choreographic, or musical performances.

* * * *

18. Plaintiffs contend:

(a) that the application and enforcement of state and city tax laws with respect to the admission charges for the

Ringling Bros. Circus violate the provisions of Sections 1105(f)(1) and 1101(d)(5) of the Tax Law in that the Ringling Bros. Circus is "a live dramatic, choreographic or musical performance";

(b) that the exception for "carnivals, rodeos or circuses" in Section 1116(d)(2)(B) of the Tax Law has reference only to the exemption granted in Section 1116(d)(1) of the Tax Law for certain nonprofit organizations and does not amend the exemption otherwise stated in Sections 1105(f)(1) and 1101(d)(5) for "a live dramatic, choreographic or musical performance."

(c) in the alternative, that if the Tax Law requires the Ringling Bros. Circus to collect state and city sales tax on admission charges from its patrons, while exempting therefrom admission charges for other live dramatic, choreographic and musical performances, the Tax Law on its face deprives plaintiffs Ruth E. Lutzic and Ringling Bros. and its millions of patrons of the equal protection of the laws in violation of Article I, Section 11, of the Constitution of the State of New York and Amendment XIV, Section 1, to the Constitution of the United States; and

(d) that the defendant State Tax Commission's arbitrary and discriminatory application of the Tax Law deprives plaintiffs Ruth E. Lutzic and Ringling Bros. and its millions of patrons of the equal protection of the laws in violation of Article I, Section 11, of the Constitution of the State of New York and Amendment XIV, Section 1, to the Constitution of the United States.

19. Because of the unlawful, unconstitutional and discriminatory application of the state and city sales taxes to the Ringling Bros. Circus and the exemption from those same taxes for shows of a similar nature and character, the plaintiff Ringling Bros. has been deprived of substantial revenues in the State of New York and its competitors have been given a substantial monetary advantage, in terms of meeting costs and obtaining profits, over the plaintiff Ringling Bros.

* * *

Wherefore, plaintiffs respectfully demand judgment:

(a) adjudging and declaring that Section 1105(f)(1) of the Tax Law of the State of New York, pertaining to the imposition of a sales tax on admission charges, cannot lawfully be applied to admission charges for the Ringling Bros. Circus;

(b) in the alternative, adjudging and declaring that Section 1105(f)(1) of the Tax Law of the State of New York, on its face and as applied, is void and unconstitutional, insofar as it imposes a sales tax on admission charges to the Ringling Bros. Circus, while exempting therefrom all other dramatic and musical arts productions;

(c) Enjoining and restraining defendants, and each and every one of them and their officers, employees and agents, both during the pendency of this action and permanently from enforcing and implementing the aforesaid State and City sales taxes to the admission charges for the Ringling Bros. Circus; and

(d) Awarding damages against defendants and in favor of plaintiff Ruth E. Lutzic and the class of persons who paid sales taxes in the State of New York on admission charges to the Ringling Bros. Circus for all sums that defendants collected from the sales taxes wrongfully imposed on performances of the Ringling Bros. Circus; and

(e) Such other and further relief as to the Court may seem just and proper.

REAVIS & MCGRATH
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005

STATE OF NEW YORK
SUPREME COURT
COUNTY OF NEW YORK

RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, Suing on Behalf of Herself and All Other Taxpayers Similarly Situated, *Plaintiffs,* —against— NEW YORK STATE TAX COMMISSION and THE CITY OF NEW YORK *Defendants.*	**ANSWER** **Index No.**

Defendant New York State Tax Commission, by Louis J. Lefkowitz, Attorney General of the State of New York, counsel for such defendant, in answer to the complaint herein, respectfully alleges:

. . . .

FIFTH: That with respect to the allegations contained in paragraph numbered "15" thereof, denies that the other shows referred to therein "are similar in nature and character to the Ringling Bros. Circus" as therein alleged.

. . . .

Dated: June 28, 1972.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendant State Tax Commission
Office and P.O. Address
The Capitol
Albany, New York 12224

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10210-75
AFFIDAVIT OF ROBERT THRUN

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ROBERT THRUN, being duly sworn, deposes and says:

1. I am a member of the firm of Reavis & McGrath, attorneys for the plaintiffs herein, and submit this affidavit in support of plaintiffs' cross-motion for summary judgment. I am personally familiar with the facts hereinafter set forth.

* * * *

THE PRIOR MOTIONS

4. On or about June 25, 1975, after all other reasonable efforts had failed, plaintiffs moved this Court for an order, pursuant to Article 31 of the CPLR, compelling the defendant New York State Tax Commission (hereinafter "the Commission") to appear at an examination before trial and to produce specified documents, which are more fully set forth in said notice of motion. The purpose of this attempted discovery of the Commission's records was primarily directed in support of plaintiffs' charge of capricious, arbitrary and unconstitutional application of the tax statutes, as stated in paragraph 2(b) above, and in aid of the contention that the tax statutes are

unconstitutional on their face, as indicated in paragraph 2(c) above.

5. In a decision, dated March 23, 1976 (a copy of which is annexed as Exhibit B to the moving affidavit of Lawrence W. Boes, sworn to January 3, 1977) the Court denied the plaintiffs' motion for an order directing the Commission to produce certain documents, and granted the Commission a protective order with regard to those specific documents. The Court also ordered the Tax Commission to appear for an examination before trial on March 29, 1976, "or as agreeable to the parties" but since the parties did not receive copies of the order until March 31, 1976, an examination could not be held on March 29, 1976. Thereafter, we twice requested the Commission to fix a date for examination by letters dated March 31, 1976 and April 8, 1976, but the Tax Commission has failed and refused to honor our requests. (Exs. F-G.)

6. In particular the plaintiffs sought production of the following documents:

(a) All applications for rulings together with all papers, memoranda, supporting documents and other materials contained in the files of the Commission, or under the Commission's custody or control, with respect to rulings by the Commission that ice shows (such as Holiday on Ice, Ice Capades and similar presentations) were not subject to the New York State sales tax on admission charges; and

(b) All papers, memoranda, submissions and other documentary evidence supplied to the Commission with respect to the application of Island Garden, Inc. and of Arnold Carlson for review of a denial of refund of sales and use tax for the period June 1, 1966 through May 31, 1970 which resulted in an administrative decision of the Commission based on these underlying materials in lieu of a public hearing; and

(c) All papers, memoranda, records and other documents contained in the files of the Commission, or in the Commission's custody or control, which were supplied to the Commission in connection with any determinations

made by the Commission relating to the applicability of the New York sales tax to circuses or circus performances.

* * * *

8. Defendant Commission again seeks a protective order denying the production of certain documents, although such motion is unnecessary, this Court having already granted such an order in its memorandum of March 23, 1976. (Ex. B annexed to Boes affidavit of January 3, 1977.) Furthermore, defendant seeks an order dismissing the complaint herein and directing that summary judgment be granted in favor of the defendant Commission. In light of the three separate and distinct grounds for legal relief urged in the first cause of action of plaintiffs' complaint and the fact that the Tax Commission's cross-motion speaks only to the first issue of statutory construction of the Tax Law, summary judgment dismissing the complaint in its entirety cannot be granted in the defendant Commission's favor. Nevertheless, since the issue of statutory construction has been squarely posed in the defendant's motion and in plaintiffs' cross-motion, and this issue is solely a question of law and both sides agree there are no triable issues of fact as to this issue, summary judgment should be granted in plaintiffs' favor, if the Court so determines, thus mooting the constitutional issues and all necessity for any factual discovery and evidentiary trial to determine this action.

* * * *

NECESSITY FOR FURTHER DISCOVERY ON CONSTITUTIONAL ISSUES

21. If, for any reason summary judgment cannot be granted to plaintiffs on the first statutory construction issue, it is clear that summary judgment may not be granted to the defendant Commission. Contrary to the defendant Commission's moving papers, this action does not solely concern an issue of statutory construction based wholly on the law. The discovery requested by plaintiffs by means of the pending motion for renewal clearly involves an issue of fact whether the statutes in question are capriciously, arbitrarily and unconstitutionally applied by the defendants, as well as whether the statutes mandate the Commission to make arbitrary and dis-

criminatory distinctions in violation of the Equal Protection clauses of the state and federal constitutions and the First Amendment as incorporated therein. Thus, even if the statute were read to include the Circus in the taxable category, the State Tax Commission has not given any discovery on the constitutional issues presented by this case. Although we twice requested the Tax Commission to set a date for oral examination pursuant to the prior order of this Court, they have failed to do so. (*See* Exs. F-G.) Therefore, summary judgment for defendant Commission would be entirely inappropriate at this time on the constitutional issues, where the facts are yet to be explored. (*See* CPLR 3212(f).) The facts in support of plaintiffs' constitutional issues are in the sole possession of the defendant Commission. On the other hand, a determination that summary judgment should be granted to plaintiffs on the issue of law presented by the statutory construction issue, would moot the pending discovery motions as well as the constitutional issues also presented in the complaint.

Therefore, it is respectfully submitted that upon determining the statutory construction issue, this Court should declare that the Circus is a dramatic or musical arts performance, grant summary judgment for the plaintiffs and cause a judgment to be entered adjudging and declaring that the plaintiff Circus is exempt from the provisions of the Tax Law §1105(f)(1), requiring the collection of admissions taxes for circuses and from the parallel provisions of the New York City Administrative Code, §A. 46-2.0(f)(1), and directing that the second cause of action be severed.

S/ Robert Thrun
ROBERT THRUN

Sworn to before me this
23rd day of March, 1977.

S/ Lawrence W. Boes
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219-5

AFFIDAVIT OF KENNETH FELD

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } SS.:

KENNETH FELD, being duly sworn, deposes and says:

1. I am the Co-Producer and Executive Vice President in charge of Talent and Production of Ringling Bros.—Barnum & Bailey Combined Shows, Inc. ("the Circus") and have been employed full-time by the Circus since 1970 in the staging and production of the Circus. I am particularly involved in scouting and searching for new talent and in co-ordinating and supervising the annual rehearsals of the new productions.

2. Ever since 1968, when Mr. Irvin Feld became Circus President and Producer, there have been two separate units of the Circus. Each of these Circus units travels practically year-round across the United States from January to late November or December, and is continually engaged in presenting Circus performances. Each year one of the two separate production units is completely remounted by the Co-Producers, Mr. Irvin Feld and myself, with the assistance of our production staff. Each new unit of the Circus utilizes hundreds of performers and animals in a meld of dramatic, choreographic and musical elements into a new edition of *The Greatest Show On Earth.*

Each production also includes a multitude of props, costumes, aerial rigging and other equipment, all of which must be precisely timed and placed so that each of the Circus' individual acts and production numbers may be staged at the right time and place in the show. After planning the design of each new show, I spend the months from November to February working with Richard Barstow, our Stager and Director, to stage and rehearse one new show at the Circus' Winter Quarters in Venice, Florida and to rehearse and review the other unit.

3. The previous work experience of Richard Barstow, Stager and Director, before he joined the Circus in 1951, included every aspect of staging and directing in various fields of show business from vaudeville to the movies, stage shows and industrial exhibits. He has also written approximately twenty-five songs for use by the Circus.

4. My function as Co-Producer and Executive Vice President Talent and Production for the Circus includes the following: (1) talent searches through Europe, South America and Asia for new acts, (2) attending, co-ordinating and supervising the four weeks of rehearsals held in December and early January for each new production, involving costumes, lighting, props, and rigging and a great variety of other elements, and (3) attending almost 300 Circus performances each year to make sure that the high production standards are maintained and improved. In this production capacity, I work with Don Foote, Costume Designer, William Bellin, Scenic Consultant, William Pruyn, Musical Arranger, Bill Bradley, Choreographer, and Antoinette Concello, Aerial Director, as well as with Mr. Barstow.

5. Just as a repertory company in the theatre continually trains its actors, we also are engaged in a continual training process for performers. For example, each year since 1968 the Circus has sponsored an eight-week session of its famous Clown College, which trains would-be clowns in the dramatic art of comic pantomime.

6. A production of the Circus contains, in my opinion, all of the traditional elements characteristic of a Broadway musical show, for example: instrumental music, songs, written lines for

the Ringmaster/Soloist, dramatic timing of acts and production numbers, and choreography, both human and animal, on the ground and in the air. We employ chorus girls as well as clowns for production numbers; we engage in annual searches for talent; we employ on a full-time basis an outstanding costume designer and design and make as well as purchase costumes; we employ a scenic consultant and lighting experts; and we also employ on a full-time basis a musical arranger, a choreographer and an aerial director. The shoes and boots for Circus performers are supplied by Ballet Makers—Capezio, a world-renowned designer of ballet footwear. Each of our units travels with its own Performance Director and Assistant Performance Director who have the duty of supervising each performance to make sure the Circus maintains the proper pace and quality of performance with which it was staged. Thus, each Circus performance is integrally comprised of dramatic, choreographic and musical elements to form what has always been known as "The Greatest Show On Earth".

S/ Kenneth Feld

KENNETH FELD

Sworn to before me this
21st day of March, 1977.

S/ Mary T. Dean

Notary Public
My Commission Expires: 7/14/79

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219-75
AFFIDAVIT OF WILLIAM PRUYN

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss.:

WILLIAM PRUYN, being duly sworn, deposes and says:

1. I am the Musical Arranger for Ringling Bros.—Barnum & Bailey Combined Shows, Inc. ("the Circus"), and from 1969 through 1975 was conductor for the Blue Unit of the Circus, one of the two units of the Circus which present Circus performances across the United States.

2. Whereas the Circus of yesteryear confined its musical selections to the simpler forms of music (marches, gallops, polkas and waltzes), today the increasing sophistication of Circus audiences and performers, as well as the high musical standards of other entertainment media, demand that the Circus music must be of high quality, well-written, well-performed and selected from a great variety of sources, including classical, jazz, rock, film scores and ballet excerpts. During the history of the Circus, a great deal of original music has been composed for the elaborate production numbers which are a hallmark of the Circus as *The Greatest Show on Earth.* The Russian-American composer, Igor Stravinsky, wrote an "Elephant Ballet" for the Circus in 1942; Deems

Taylor wrote a musical suite called "Through the Looking-Glass" inspired by Louis Carroll's book of the same name; other tunes were written for the Circus by such men as Victor Young, Bert Knapp, Henry Sullivan, and long-time Director of the Circus, Mr. Richard Barstow.

3. The musical program of each unit of *The Greatest Show on Earth* requires well over 200 different compositions. As Musical Arranger for the Circus, I make the initial selection of individual pieces used as background music, by choosing various tunes which I feel will best fit the action and by timing each selection to match the appropriate segment of the performers' presentation. I first "sketch" the music for organ and drums and each selection is auditioned at the "run-throughs" prior to opening of each new production of a unit. We hold conferences with the Co-Producers, Messrs. Irvin and Kenneth Feld, to make sure that the music will properly support and enhance each individual act. They and I are also concerned that the overall musical score will be representative of every type of good music, which will please all segments of our audience. It is also important to the Circus that the atmosphere of "Total Circus" always be present in an auditory as well as visual sense. After the musical program has been approved, the orchestrations are written in a bright, brilliant and brassy style. This music is then performed by a band consisting of a conductor and 14 musicians during the hundreds of Circus performances each year.

S/ William Pruyn
WILLIAM PRUYN

Sworn to before me this
23rd day of March, 1977

S/ MARY T. DEAN
Notary Public

My Commission expires 7/14/79.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

LEONARD DUANE EASTER, being duly sworn, deposes and says:

1. I am a resident of the State and City of New York, County of Kings.

2. On September 1, 1977, I purchased one general admission ticket for the evening performance of the Big Apple Circus (hereinafter referred to as the "Circus") at the box office located at Gate No. 1, Battery Park City, New York, New York. The purchase price of said ticket was $5.00.

3. I paid no tax on the price of the said ticket. There was no separate statement or notice of a tax on the price of the said ticket either at the box office or on the ticket which I purchased.

4. I attended the September 1, 1977 evening performance of the Circus. The said performance took place in a single ring, located in a big tent. Spectator seats consisted of bleachers located at the perimeter of the circus ring. Popcorn, peanuts and other refreshments were sold. The performance was presided over by a ringmaster, dressed in white tie and tails. In addition, a small circus band provided the background music for various acts.

5. The circus performance lasted for approximately 1½ hours and consisted of ten separate and distinct acts, interspersed with clown acts and accompanied by background music from the circus band. (See the Circus Program annexed hereto as Exhibit A.) In addition "Los Indianos", a dance troupe, performed a "Sabateo dance with bolas and bambas".

6. In general, the performance consisted of clown acts, tumbling, trapeze acts, juggling and dancing. In short, it was an entertaining circus performance.

S/ LEONARD DUANE EASTER
Leonard Duane Easter

Sworn to before me this 29th day
of September, 1977.

S/ ARTHUR NEEDLEMAN
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RINGLING BROS.—BARNUM & BAILEY COMBINED SHOWS, INC., and RUTH E. LUTZIC, suing on behalf of herself and all other taxpayers similarly situated,

Plaintiffs,

—against—

NEW YORK STATE TAX COMMISSION AND THE CITY OF NEW YORK,

Defendants.

Index No. 10219-75

AFFIDAVIT OF BILL BRADLEY

DISTRICT OF COLUMBIA } ss.:

BILL BRADLEY, being duly sworn, deposes and says:

1. I am the Choreographer for Ringling Bros.—Barnum & Bailey Combined Shows, Inc. ("the Circus") and have acted as such since 1967.

2. In my capacity as Choreographer for the Circus, I help create and rehearse the five elaborate production numbers which are included in the Circus, each of which involves major choreographic elements.

3. Early each year I participate in a series of extensive creative meetings with the Producers of the Circus to plan and create the next season's new production. At these meetings, the Producers, the Director and I, together with the Costume Designer and Musical Arranger, decide on themes and all of the other complex details that are involved in the five production numbers.

4. I subsequently spend approximately four full weeks rehearsing the choreographic elements of each new production

before it goes out on its national tour. During this period, I work extensively with the showgirls who perform the many dance routines in the Circus as well as with the other members of the cast, virtually all of whom participate in the production numbers. Many hours are spent each day on the choreographic elements of the show and in coordinating the movements of the dancers, the other performers, the animals and the props into a polished and professional performance.

5. My previous experience in show business includes working with Mr. Richard Barstow in staging night club shows for the *Latin Quarter,* working with such famous choreographers and directors as Jerome Robbins, Agnes De Mille and Elia Kazan, and working as director-choreographer for various European television systems.

S/ Bill Bradley
BILL BRADLEY

Sworn to before me this 17th
day of March, 1977.

S/ MARY T. DEAN
.....
Notary Public

My Commission expires 7/14/79.

Letter Ruling Exempting
Ice Show From Admissions Tax

August 25, 1965

This is in reply to your letter in which you seek a ruling that an ice show is exempt from the admissions tax imposed by Section 1105(f)(1) of the Tax Law, on the basis of its being a "dramatic or musical arts performance", within the terms of the statute.

Section 1105(f)(1) of the Tax Law imposes an admissions tax of 2% upon:

"Any admission charge. . .except charges for admission to . . . dramatic or musical arts performances. . ."

The term "dramatic or musical arts admission charge" is defined in Section 1101(d)(5) as:

"Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

You have requested exemption from the admissions tax on the ground that the ice show is a live choreographic performance and have submitted evidence in your letter and in attached exhibits in support of this claim.

It appears from your letter and exhibits that the programs presented by the ice show consist of carefully conceived and executed, lavishly costumed dance numbers involving also solos and duets and mass performers in ballet, modern dance and musical comedy dances. These dances are performed on skates for the most part, by artists who are talented in the fields of ballet and modern dance. There is a live musical accompaniment which also sometimes includes original compositions. The dance numbers are planned around a central theme and are choreographed, which involves their composition and execution with the aid of sketches indicating the dance patterns and the positions of the individual dancers at every stage of each number's performance. The entire program makes use of all aspects and techniques of a regular Broadway theatrical production including costumes, scenery and lighting.

"Choreography" has been defined as the "art of arranging dances, especially ballet". (Webster's New International Dictionary (2nd edition)). Your letter indicates that ballet is a central feature of the ice show, with both individual performers

and the ensemble, the corps de ballet, having taken intensive training in that dance form; and that, in general, the ice show is in essence, a program of carefully designed dances adapted for presentation on ice.

I am therefore, of the opinion that the ice show constitutes "a live choreographic performance" within the meaning of the law, and that consequently, it is exempt from the admissions tax imposed by the New York State Sales Tax Law.

Very truly yours,

EDWARD H. BEST
Counsel